

1  
2  
3  
4  
5  
**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**  
6  
7  
8

9 Juan Carlos Arriaga,

10 Plaintiff,

11 v.

12 Arizona Department of Corrections, et al.,

13 Defendants.

No. CV-20-00084-PHX-DJH (ESW)

**ORDER**

15 Pending before the Court is Plaintiff's Request to Substitute Nurse Westlake for  
16 Defendant Wesley (Doc. 31) and the November 6, 2020, Report and Recommendation  
17 ("R&R") issued by Magistrate Judge Eileen S. Willett (Doc. 35). In her R&R, Magistrate  
18 Judge Willett recommends this Court dismiss Defendant Wesley for failure to serve  
19 pursuant to Federal Rule of Civil Procedure 4(m), and deny Plaintiff's request to substitute  
20 "Nurse Westlake" for Defendant Wesley (Doc. 35). Magistrate Judge Willett gave the  
21 parties 14 days to file specific written objections with this Court. (*Id.* at 4). She also  
22 cautioned that "[f]ailure to file timely objections may result in the acceptance of the Report  
23 and Recommendation by the District Court without future review." (*Id.*)

24 Plaintiff filed a three-sentence Objection on December 10, 2020, in which he states,  
25 "Due to COVID-19 I was unable to get help. From the discovery I got the true name of  
26 Nurse Wesley. As such, I should be allowed to substitute." (Doc. 37). Plaintiff implies  
27 that the untimeliness of his Objection is due to being infected with COVID-19. Although  
28 unclear, the Court will assume these circumstances and excuse his late filing.

1           **I. Standard of Review**

2           This Court must “make a *de novo* determination of those portions of the report or  
 3 specified proposed findings or recommendations to which” Petitioner objects. 28 U.S.C.  
 4 § 636(b)(1)(C); *see also* Fed. R. Civ. P. 72(b)(3) (“The district judge must determine *de*  
 5 *novo* any part of the magistrate judge’s disposition that has been properly objected to.”);  
 6 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (same). In  
 7 doing so, the Court “may accept, reject, or modify, in whole or in part, the findings or  
 8 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ.  
 9 P. 72(b)(3). At the same time, however, the relevant provision of the Federal Magistrates  
 10 Act, 28 U.S.C. § 636(b)(1)(C), “does not on its face require any review at all. . . of any  
 11 issue that is not the subject of an objection.” *Thomas v. Arn*, 474 U.S. 140, 149 (1989);  
 12 *see also* *Wang v. Masaitis*, 416 F.3d 992, 1000 n. 13 (9th Cir. 2005) (“Of course, *de novo*  
 13 review of a R&R is only required when an objection is made to the R&R”). It is well-  
 14 settled that ““failure to object to a magistrate judge’s factual findings waives the right to  
 15 challenge those findings[.]”” *Bastidas v. Chappell*, 791 F.3d 1155, 1159 (9th Cir. 2015)  
 16 (quoting *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (internal quotation marks  
 17 omitted) (footnote omitted)).

18           **II. Discussion**

19           Plaintiff’s sole objection to the R&R relates to Magistrate Willett’s conclusion that  
 20 the substitution of Nurse Westlake for Defendant Wesley was improper under Fed. R. Civ.  
 21 P. 25. (Doc. 35 at 4). Judge Willett correctly found the none of the circumstances  
 22 justifying substitution of a party in a civil matter existed, and explained that “Should  
 23 Plaintiff wish to name Nurse Westlake as a party, the appropriate mechanism to attempt to  
 24 do so is a properly filed, timely motion to amend the First Amended Complaint.” (*Id.* at  
 25 4). Plaintiff suggests that discovery has borne out the true identify of a defendant. (Doc.  
 26 37). Judge Willett correctly explained the process by which Plaintiff may seek to add this  
 27 defendant to his First Amended Complaint. Substitution, however, is not the proper  
 28 remedy. Accordingly, this objection is overruled. The Court will adopt the R&R as the  
 Order of this Court.

### III. Conclusion

Accordingly,

**IT IS ORDERED** that Magistrate Judge Willett's Report and Recommendation (Doc. 35) is **ACCEPTED** and **ADOPTED** as the Order of this Court. Plaintiff's request to substitute Nurse Westlake for Defendant Wesley (Doc. 31) is **DENIED**.

**IT IS FURTHER ORDERED** that Defendant Wesley is dismissed from Plaintiff's First Amended Complaint (Doc. 14) for failure to serve pursuant to Fed. R. Civ. P. 4(m).

Dated this 12th day of May, 2021.

  
Honorable Diane J. Humetewa  
United States District Judge